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Marissa L. Antoinette

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# Examining How the Inclusion of Disabled Students Into the General Classroom May Affect Non-Disabled Classmates

## **Cover Page Footnote**

J.D. candidate, Fordham University School of Law, 2004; B.S., Cornell University, 2001. I would like to thank Professor Peter Siegelman for his guidance and support. I dedicate this comment to my family for their perpetual love and encouragement, and especially to my mother, a high school teacher, whose numerous dinner conversations about her job first sparked my interest in the inclusion debate.

# EXAMINING HOW THE INCLUSION OF DISABLED STUDENTS INTO THE GENERAL CLASSROOM MAY AFFECT NON-DISABLED CLASSMATES

Marissa L. Antoinette\*

## INTRODUCTION

The Individuals with Disabilities Education Act ("IDEA") affords disabled students the right to be educated alongside non-disabled students in the general classroom.<sup>1</sup> Specifically, § 1412(5)(b) of Title 20 of the IDEA requires that states receiving educational funding under the IDEA establish "procedures to assure that, to the maximum extent appropriate, children with disabilities are educated with children who are not disabled."<sup>2</sup>

When the inclusion of a disabled student into a general classroom is appropriate, the class will run smoothly and students will not be disadvantaged by the heterogeneity.<sup>3</sup> Nevertheless, the controversy over including disabled students in the general classroom has been hotly debated for the past few years, often from the perspective of the disabled student.<sup>4</sup> But the question of how such inclusion affects non-disabled students, now that the classroom is opened to students with disabilities, remains.

As the IDEA mandates, disabled students must be included into the classroom, "to the maximum extent *appropriate*."<sup>5</sup> Some argue, however, that the IDEA orders full inclusion; that is, inclusion into the regular classroom of any disabled student, regardless of his

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1. Tamera Wong, Note, *Falling Into Full Inclusion: Placing Socialization Over Individualized Education*, 5 U.C. DAVIS J. JUV. L. & POL'Y 275, 275 (2001).

2. 20 U.S.C. § 1412(5)(b) (2000).

3. Kathryn E. Crossley, Note, *Inclusion: A New Addition to Remedy a History of Inadequate Conditions and Terms*, 4 WASH. U. J.L. & POL'Y 239, 253-54 (2000).

4. See, e.g., James M. Kauffman & Devery R. Mock, *Delusion of Full Inclusion* 3 (2002) (unpublished manuscript, on file with the author); Wong, *supra* note 1, at 275.

5. 20 U.S.C. § 1412(5)(b) (emphasis added).

situation.<sup>6</sup> Full inclusion requires that all disabled children be placed in the general classroom “for all the school day in every school setting, preschool through high school.”<sup>7</sup> Thus, full inclusion calls for the end of special education.<sup>8</sup> Proponents of full inclusion maintain that special education attaches a stigma to disabled students; that heterogeneous mixing in the general classroom will provide diversity; and that full inclusion gives all students the same educational opportunities.<sup>9</sup> In response, opponents of full inclusion chastise as naïve the idea that heterogeneous education is enough to rid disabled students of their deeply embedded physical or emotional handicaps.<sup>10</sup> Opponents argue that certain disabled students need very particular attention, and it is these students whom the IDEA intended to remain in separate, special classrooms.<sup>11</sup>

Part I of this Comment outlines the history of inclusion as established through federal legislation, as well as its gradual implementation in New York City. Part II examines the issues concerning inclusion, looking at the consequences inappropriate inclusion of disabled students may have on the non-disabled (“general”) student. Finally, Part III proposes a solution, suggesting that a school district give a disabled student a “three strikes” policy regarding disruptions, after which she may be removed, permanently or temporarily, from the general classroom at the request of a fellow student, parent, or the teacher. This Comment further advises that schools concurrently work to change the perception of special education from a holding station for damaged children to a valuable learning environment for unique students.

## I. THE HISTORY BEHIND THE INCLUSION INITIATIVE

### A. Foundations for Change

The last quarter-century has provided significant educational opportunities that the disabled student was previously denied.<sup>12</sup> In the past, educating the disabled student in the public school was

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6. See Anne Proffitt Dupre, *Disability and the Public Schools: The Case Against “Inclusion,”* 72 WASH. L. REV. 775, 807 (1997).

7. *Id.* at 779-80.

8. Wong, *supra* note 1, at 279.

9. Dupre, *supra* note 6, at 793; Crossley, *supra* note 4, at 253-54; Wong, *supra* note 1, at 275.

10. Kaufman & Mock, *supra* note 4, at 6.

11. *Id.*

12. Dupre, *supra* note 6, at 783.

not a matter of societal importance.<sup>13</sup> Certain state statutes permitted public schools to exclude disabled children from public schools altogether.<sup>14</sup> Instead of schooling, the severely disabled were sent to institutions.<sup>15</sup> As treatments developed to assist the disabled in living more normal and longer lives, however, disabled students began to look towards integration into the public school system.<sup>16</sup> They found the means to that end in the civil rights movement.<sup>17</sup>

In the prominent decision *Brown v. Board of Education*, the United States Supreme Court held that racial segregation in public schools violates the Equal Protection Clause.<sup>18</sup> The Court maintained that the right to an education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms."<sup>19</sup> Advocates of the disabled relied on the *Brown* Court's determination to argue that disabled students deserve a spot in public schools, too.<sup>20</sup>

In response to public pressure from *Brown* and two landmark federal court decisions assuring disabled students access to appropriate public education,<sup>21</sup> Congress enacted the Rehabilitation Act of 1973<sup>22</sup> and the Education for All Handicapped Children Act ("EAHCA") of 1975.<sup>23</sup> Section 504 of the Rehabilitation Act

13. *Id.*

14. These statutes allowed public schools to exclude disabled students if school officials determined the child would not benefit from public education or would disrupt the classroom. See Richard C. Handel, *The Role of the Advocate in Securing the Handicapped Child's Right to an Effective Minimal Education*, 36 OHIO ST. L.J. 349, 351 (1975).

15. Dupre, *supra* note 6, at 783.

16. *Id.* at 784.

17. Wong, *supra* note 1, at 277.

18. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); see ALLAN IDES & CHRISTOPHER N. MAY, *CONSTITUTIONAL LAW: NATIONAL POWER AND FEDERALISM* 49 (1998). The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution prohibits states from denying any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV.

19. *Brown*, 347 U.S. at 493.

20. Wong, *supra* note 1, at 277.

21. *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 874-75 (D.D.C. 1972) (holding that the District of Columbia must provide disabled students with access to public schools, when seven disabled plaintiffs were excluded from public school classes without providing alternative education to them or any notice to their parents); *Pa. Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 302 (E.D. Pa. 1972) (issuing a consent order requiring Pennsylvania to provide a free, public program of education and training appropriate to the child's capacity because mentally retarded children were excluded from the state's public schools).

22. 29 U.S.C. § 794 (1994).

23. 20 U.S.C. §§ 1401-1420 (1988 & Supp. V 1993).

“prohibit[ed] discrimination against persons with disabilities for all programs receiving federal funding,” including public education.<sup>24</sup> The EAHCA, which is now incorporated into the IDEA, set out the substantive rights of disabled children.<sup>25</sup> It required that children with disabilities have access to “a free appropriate public education.”<sup>26</sup> Disabled students had won their legal right to public education.

Eventually, the disabled students’ right of admission into public schools expanded into the idea of their admission into the general classroom. Inclusion likely had its historical roots in the 1963 article, “Exceptional Children in the Schools,” by Lloyd Dunn, a special education authority.<sup>27</sup> Dunn suggested that special education of children with mild mental retardation was morally and educationally wrong because homogenous grouping damaged these children’s self-esteem and caused them to be educationally disadvantaged.<sup>28</sup> Widely citing Dunn and using the EAHCA as a guideline, advocates of inclusion began to fight for the total elimination of special education.<sup>29</sup>

## B. The Individuals With Disabilities Education Act

The IDEA<sup>30</sup> requires any state that receives federal funding for public education to ensure that “a free and appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21.”<sup>31</sup> As the disabled student moves through the public education system, she shall have an Individualized Education Program (“IEP”) developed and revised ac-

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24. 29 U.S.C. § 794; Wong, *supra* note 1, at 277.

25. 20 U.S.C. § 1400(d) (Supp. V 1993); Wong, *supra* note 1, at 278.

26. Comment, *Disciplining Children With Disabilities Under the Individuals With Disabilities Education Act*, 12 J. CONTEMP. HEALTH L. & POL’Y 155, 161 (1995) (citation omitted) [hereinafter *Disciplining Children*]. The free appropriate public education to which a disabled child is entitled under 20 U.S.C. § 1400(d), although not requiring a school “to maximize the child’s potential, the child must receive access to specialized instruction and related services that are individually designed to provide educational benefit and the educational placement must be likely to produce progress, not regression or trivial educational advance.” *Bd. of Educ. v. Hunter*, 84 F. Supp. 2d 702, 705 (D. Md. 2000) (citation omitted).

27. LLOYD DUNN, *EXCEPTIONAL CHILDREN IN THE SCHOOLS* 233 (1963).

28. DANIEL P. HALLAHAN & JAMES M. KAUFFMAN, *THE ILLUSION OF FULL INCLUSION: A COMPREHENSIVE CRITIQUE OF A CURRENT SPECIAL EDUCATION BANDWAGON* 19-20 (1995).

29. Wong, *supra* note 1, at 279.

30. The Individuals with Disabilities Education Act (“IDEA”) was created in 1990 and incorporates the Education for All Handicapped Children Act of 1975. The IDEA was later amended in 1997.

31. 20 U.S.C. § 1412(a)(1)(A)(2000).

ording to her educational need for services.<sup>32</sup> Most pertinent to the inclusion debate, the IDEA requires that children with disabilities be educated "to the maximum extent appropriate" with children who are not disabled.<sup>33</sup> The IDEA also requires that each child is educated in the least restrictive environment.<sup>34</sup>

Proponents of full inclusion maintain that the language of the IDEA mandates full inclusion.<sup>35</sup> They argue that by requiring students with disabilities to be placed in the least restrictive environment, the IDEA requires the elimination of restrictive special education programs.<sup>36</sup> Opponents, on the other hand, argue that the IDEA's limiting phrase, "to the maximum extent appropriate," is recognition that not every disabled child will thrive if included in the regular classroom.<sup>37</sup> They believe the very nature of the IEP requirement proves the IDEA did not intend for a "one-size-fits-all" inclusion policy.<sup>38</sup> Whether it mandates full inclusion or not, the IDEA certainly expresses a strong preference for inclusion: "The removal of children with disabilities from the regular educational environment [may] occur *only* when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."<sup>39</sup>

Courts<sup>40</sup> have not been of much help creating a clear picture of how far and wide Congress intended inclusion to extend.<sup>41</sup> Several circuits, however, have established factor-based tests for determining whether a disabled child should be included into a regular classroom. In *Sacramento City Unified School District, Board of Education v. Rachel H.*, the Ninth Circuit defined what seems to be

32. 20 U.S.C. § 1412(4).

33. 20 U.S.C. § 1412(a)(5)(A).

34. *Id.*

35. Dupre, *supra* note 6, at 779-80.

36. Wong, *supra* note 1, at 278.

37. Joanne L. Huston, *Inclusion: A Proposed Remedial Approach Ignores Legal and Educational Issues*, 27 J.L. & EDUC. 249, 251 (1998).

38. *Id.*

39. 20 U.S.C. § 1412(a)(5)(A) (emphasis added).

40. While courts have not yet adopted the doctrine of full inclusion, recent appellate court cases have applied standards which put social benefits of an inclusive classroom equal to or above the individual academic needs of the disabled child. Wong, *supra* note 1, at 280; *see, e.g.*, *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir. 1994); *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1216 (3d Cir. 1993); *Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 697 (11th Cir. 1991); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1047-48 (5th Cir. 1989); *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983).

41. Crossley, *supra* note 3, at 245.

the current standard.<sup>42</sup> The court delineated four factors to be considered in deciding whether to include a disabled student in the general classroom: an assessment of the educational benefits of the inclusion; an assessment of the non-academic, social benefits of the inclusion; the financial costs of inclusion (for example, supplemental aides and services); and the effects the disabled student has on the teacher and non-disabled students in the classroom.<sup>43</sup> Harm to the general students is taken into consideration only if the child places an extraordinary burden on the teacher's time and significantly impedes learning by the general students.<sup>44</sup>

Full inclusion opponents argue that it is unclear exactly when a disabled student becomes an extraordinary burden or significant impediment requiring removal.<sup>45</sup> One challenger suggests that a school should remove, at least temporarily, a disabled student from the general classroom if on more than one occasion the student's disruptions threaten her classmates' learning or safety.<sup>46</sup> Since *Rachel H.*, a school district has a heavy burden of proof to show why a student should be placed in a special education program, rather than in a general classroom.<sup>47</sup> According to the court, only a significant negative impact on the class as a whole by the disabled student will be considered in deciding whether to remove her.<sup>48</sup>

### C. The Reaction in New York City Public Schools

New York City has lagged behind other cities and states in its inclusion efforts.<sup>49</sup> Historically, New York City educated emotionally disturbed and behaviorally challenged students in 600 schools,<sup>50</sup> which essentially became containment facilities for troublesome students.<sup>51</sup> As late as 1973, New York City maintained a "Medical Discharge Register," which listed students who

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42. *Rachel H.*, 14 F.3d at 1398; Wong, *supra* note 1, at 280.

43. Wong, *supra* note 1, at 280-81.

44. *Id.*

45. See Crossley, *supra* note 3, at 245.

46. *Id.* at 258-60.

47. Wong, *supra* note 1, at 283.

48. *Id.* at 284.

49. REPORT OF THE LEAST RESTRICTIVE ENV'T COALITION, STILL WAITING, AFTER ALL THESE YEARS. . . . INCLUSION OF CHILDREN WITH SPECIAL NEEDS IN NEW YORK CITY PUBLIC SCHOOLS 3 (2001) [hereinafter STILL WAITING].

50. The "600" schools were established in 1946 for the "education of children so severely emotionally disturbed or socially maladjusted as to make continuance in a regular school hazardous to their own safety and welfare and to the safety and welfare of the other pupils." *Lora v. Bd. of Educ.*, 456 F. Supp. 1211, 1219-21 (E.D.N.Y. 1978).

51. *Id.* at 1219-22.



were indefinitely excluded from school because of their disabilities.<sup>52</sup> Many students were never even evaluated for school, or they received in home instruction for lack of appropriate placement.<sup>53</sup> As recently as the 2000-01 school year, fifty-four percent of disabled students in New York City spent more than sixty percent of their time in a separate classroom or facility for children with disabilities.<sup>54</sup>

Even after a class action suit in 1983 required New York City public schools to comply with relevant federal education laws like the EAHCA,<sup>55</sup> New York State and City were still unable or unwilling to satisfy the federal requirement that disabled students be educated in the least restrictive environment.<sup>56</sup> Critics argued that a lack of adequate services in general education and a state funding formula which provided almost twice as much extra funding for children educated in contained environments were to blame.<sup>57</sup>

In 1996, New York City launched the "Least Restrictive Education Initiative" to provide schools in participating districts with opportunities to create and promote new instructional programs, including inclusive classes, to educate students with disabilities.<sup>58</sup> The Initiative, however, did not require consistency in its implementation and thus, the result was a hodgepodge of different models of varying quality.<sup>59</sup>

In June, 2000, the New York City Board of Education adopted the Revised Continuum of Special Education Services ("Continuum"), to be phased into schools beginning in February, 2001.<sup>60</sup> The Continuum is intended to affirm the right of every student to be educated in the least restrictive environment.<sup>61</sup> Under the Continuum, a student meets with an IEP team to determine if the stu-

52. *Reid v. Bd. of Educ.*, 453 F.2d 238, 240-41 (2d Cir. 1971).

53. *Id.*

54. STILL WAITING, *supra* note 49, at 3.

55. *Jose P. v. Ambach*, 557 F. Supp. 1230, 1242 (1983).

56. STILL WAITING, *supra* note 49, at 39.

57. *Id.* at 39-41. Until 2000, New York State provided almost twice as much extra funding for disabled children educated in more restrictive settings at it did for disabled children educated in less restrictive settings. *Id.* Furthermore, the inadequate funding, overcrowded classrooms and poorly prepared, overburdened teachers in New York public schools made restrictive placements an easy way to dispose of students who would take up scarce time and resources in the general classroom. *Id.*

58. *Id.* at 45.

59. *Id.* The Board gave detailed guidance for planning and training the first year of participation, but it failed to require effective oversight or consistency to continue implementation of the LRE Initiative. *Id.*

60. *Id.*

61. *Id.* at 5.

dent is eligible for special education services.<sup>62</sup> A disability classification, however, does not preclude the student from being placed in a general classroom.<sup>63</sup> The IEP team first considers whether the disabled student can be placed in general education, using supplementary aides and services.<sup>64</sup> Alternatively, the IEP team considers special class services for students whose needs cannot be met within the general classroom, even with the use of supplementary aides and services.<sup>65</sup> According to the Continuum:

If the disabled student, with supplementary aides and services requires so much of the teacher's time that the teacher cannot give adequate attention to the needs of other students in the classroom, is so disruptive in the classroom that the education of the student or other students is significantly impacted, and/or requires the curriculum to be modified so significantly that it bears little relation to the instruction in the classroom and the student cannot meet his IEP goals, the general classroom may not be an appropriate setting for the student.<sup>66</sup>

Under the Continuum, teachers are to be provided with training programs aimed at helping to create integrated models and assimilating diverse learners into the classroom.<sup>67</sup> Furthermore, the Continuum maintains that the number of disabled students in an inclusion classroom should not exceed forty percent of the total class register.<sup>68</sup> In accordance with the IDEA, the Continuum allows a parent of a disabled child who disagrees with the determination of the IEP team to seek resolution through mediation.<sup>69</sup>

In New York, however, uncertainties for the general student remain. At what point does a disabled student require "so much" of the teacher's time? At what point is disruption significant? At what point is a curriculum significantly altered? In short, when ex-

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62. *Id.* at 47. Services include all educationally related support services, reading interventions, remedial instruction and various behavior support or social skills programs. *Id.*

63. *See* SCHOOL PROGRAMS AND SUPPORT SERVICES: FREQUENTLY ASKED QUESTIONS, at <http://www.nyccnet.edu/offices/spss/sei/faq.asp> (last visited August 22, 2003) [hereinafter SCHOOL PROGRAMS].

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* The IDEA entitles a parent of a disabled student to present complaints about their child's Individualized Education Program. *Disciplining Children*, *supra* note 26, at 164.

actly is it inappropriate for the disabled student to be in the general classroom?

## **PART II. HOW INCLUSION AFFECTS THE GENERAL STUDENT**

### **A. The Stigma Remains**

Full inclusion advocates want to see the elimination of special education.<sup>70</sup> They argue that special education is morally and educationally wrong, because grouping based on ability damages the self-esteem of those in the “inferior” grouping.<sup>71</sup> Advocates propose that including all disabled students in the general classroom will rid these students of the social stigma associated with special needs classrooms.<sup>72</sup> They argue that inclusion will provide heterogeneous social mixing and expose all students to diversity and tolerance.<sup>73</sup> The elimination of social stigmatization outweighs any benefits from segregated classrooms.<sup>74</sup>

While promoting an integrated sense of community sounds attractive, opponents of full inclusion argue that, in reality it is quite difficult to achieve, especially among juveniles.<sup>75</sup> Opponents contend that it is naïve to assume that a disabled child will feel confident in a classroom of children she perceives as being more capable or “normal” than she.<sup>76</sup> Similarly, the general student may be unwilling to accept her disabled classmate, whom she perceives as a burden on the classroom.<sup>77</sup> One parent illustrated this scenario by describing how her disabled son functions in the general classroom: “He is uncomfortable around other children. He expresses dislike of normal students. He is also disliked by them and they tell me about his behavior when I’m on campus.”<sup>78</sup>

Opponents further argue that the stigma of the disabled student may be perpetuated and enlarged in the general classroom, to the detriment of the general student.<sup>79</sup> When a disabled student enters

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70. See Dupre, *supra* note 6, at 780.

71. Kauffman & Mock, *supra* note 4, at 4.

72. See Wong, *supra* note 1, at 278.

73. See Crossley, *supra* note 3, at 254. In the general classroom, the disabled student may “eventually come to realize that everyone is different in one way or another.” *Id.*

74. See Wong, *supra* note 1, at 279.

75. *Id.* at 283.

76. Dupre, *supra* note 6, at 825.

77. See *Disciplining Children*, *supra* note 26, at 159.

78. Kauffman & Mock *supra* note 4, at 6.

79. See Dupre, *supra* note 6, at 825.

the general classroom, it is often not without accommodations.<sup>80</sup> The IDEA explicitly requires an Individualized Education Program for each disabled student,<sup>81</sup> which may include the use of supplemental aides, study guides, and special or untimed exams. These different activities and materials in one classroom tend to separate students with disabilities from those without.<sup>82</sup> Accordingly, the disabled student may be embarrassed by the special treatment she gets.<sup>83</sup> At the same time, these accommodations may reinforce the general student's perception that the disabled student is inferior.<sup>84</sup>

Moreover, opponents argue that if the general student identifies the concessions given to her disabled classmate as being significant, she will likely resent the classmate.<sup>85</sup> The general student, who likely would also benefit from extra resources or accommodations,<sup>86</sup> will be left feeling "short-changed" by the school system.<sup>87</sup> Opponents maintain that if students feel discouraged or insecure due to their heterogeneous mixing, then inclusion is helping no one and the negative stigma associated with disability is perpetuated tenfold.<sup>88</sup>

## B. Equality in Education?

Full inclusion aims to provide all students with the same educational opportunities in one classroom.<sup>89</sup> Opponents believe, however, that this goal is oversimplified and utopian.<sup>90</sup> The premise assumes that the disabled child shares enough characteristics and abilities with the general student to be adequately educated in the same environment.<sup>91</sup> While this may be true in some instances, opponents argue that not every disabled student can effectively be

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80. Wong, *supra* note 1, at 289.

81. 20 U.S.C. § 1412(4) (2003).

82. See Dupre, *supra* note 6, at 849. Developing separate or different objectives for one or a few students in the class can lead to isolation or segregation. Kauffman & Mock, *supra* note 4, at 12.

83. See Dupre, *supra* note 6, at 820.

84. See *id.* at 825.

85. See MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE 224 (1997).

86. A general student may similarly benefit from having the testing accommodations, teacher aides, or other resources presently available only to disabled students. See *id.*

87. *Id.*

88. Dupre, *supra* note 6, at 818-26.

89. Wong, *supra* note 1, at 278-80.

90. Kauffman & Mock, *supra* note 4, at 10-14.

91. Wong, *supra* note 1, at 281-82.

educated alongside general students.<sup>92</sup> In fact, they contend that the IDEA's requirement that each disabled child have her own Individual Education Program implies that every child has a different set of educational needs that require unique attention.<sup>93</sup> Those who challenge full inclusion note that disabled students, who have an emotional, behavioral, or physical handicap, will not see that problem disappear simply because they are put into a different classroom;<sup>94</sup> to assume otherwise is to oversimplify a very real, medical problem.<sup>95</sup>

A public school's goal, overall, is to create a learning community in which each student can obtain an education commensurate with her potential.<sup>96</sup> Teachers are told that the nation expects its students to out perform those from other countries on standardized tests.<sup>97</sup> Educators are pressured to ensure that all of their pupils progress as rapidly as possible through the academic curriculum required to advance to the next grade level.<sup>98</sup> The success of a lesson and the progress of a student depend on the personality of the class and the community of learning.<sup>99</sup> Those who oppose full inclusion argue that it follows that if disabled and non-disabled classmates have different learning curves, each student in the class will not be learning up to her potential; either the class will be fast-paced and the disabled student will feel overwhelmed,<sup>100</sup> or the class will be slowed down, leaving the general student feeling unchallenged.<sup>101</sup>

Further, since courts and the IDEA advocate that accommodations be made for the disabled student, the general classroom curriculum will likely be modified to suit the needs of the disabled student.<sup>102</sup> A disabled student may need an individualized lesson plan, a modified teaching style, or a different testing procedure.<sup>103</sup>

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92. Crossley, *supra* note 3, at 254-55.

93. Wong, *supra* note 1, at 282.

94. Dupre, *supra* note 6, at 840.

95. Kauffman & Mock, *supra* note 4, at 10-14.

96. Dupre, *supra* note 6, at 822. A proper goal is to maximize the aggregate value of the educational experience for the group, that is, to maximize some utilitarian social welfare function. KELMAN & LESTER, *supra* note 85, at 122.

97. Huston, *supra* note 37, at 254.

98. *Id.*

99. Dupre, *supra* note 6, at 842.

100. *See id.* at 819.

101. *See id.*

102. 20 U.S.C. § 1412(5)(a) (2000); *see, e.g.*, *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1216 (3rd Cir. 1993) (requiring schools to try to "modify the regular education program to accommodate [the] disabled child").

103. Wong, *supra* note 1, at 289.

Though major alterations to a lesson are not required, a teacher may have to make adjustments to the way instruction is delivered, the amount of content covered, and the level of assistance provided to the students.<sup>104</sup> Similarly, a teacher may shorten a complicated lesson because time is required to meet the needs of a disabled child who is learning at a slower pace,<sup>105</sup> or omit an enrichment lesson which adds to the educational capital of her students for fear that it would confuse the disabled students in the class.<sup>106</sup> Opponents argue that if accommodations for the disabled student in the general classroom water-down the classroom curriculum, even to a small extent, then the general student will not be challenged to her full aptitude.<sup>107</sup>

### C. The Bad Apple Principle

Challengers also contend that even if the curriculum remains unchanged, the general student may be harmed by a disabled student's disruptions.<sup>108</sup> Inclusion advocates maintain that inclusion allows a disabled student to excel, both by modeling herself after the general student and maximizing growth.<sup>109</sup> This argument, however, presupposes that a disabled student can smoothly integrate herself into the class' socialization and lessons.<sup>110</sup> Opponents argue that, realistically, the disabled student will have difficulty adjusting to the general classroom,<sup>111</sup> and that this difficulty will distract the general student.<sup>112</sup>

In addition, for students with severe disabilities, even the most basic aspect of general education classrooms (for example, interactions with peers, unpredictable reinforcement schedules, and a room filled with desks, chairs, books and other objects) may serve as triggers for problematic behavior.<sup>113</sup> The disabled student's struggle to adapt often impedes the education of the general students in the classroom.<sup>114</sup>

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104. *Id.*

105. Dupre, *supra* note 6, at 851.

106. *Id.*

107. *See id.* at 851-52.

108. *Id.* at 845-49.

109. *Id.* at 826; Wong, *supra* note 1, at 282.

110. *See* Wong, *supra* note 1, at 281-82.

111. Kauffman & Mock, *supra* note 4, at 6.

112. Dupre, *supra* note 6, at 845-47.

113. Kauffman & Mock, *supra* note 4, at 6.

114. Crossley, *supra* note 3, at 241.

According to the “bad apple principle,” if one group member is disorderly, the entire group suffers.<sup>115</sup> Opponents point out that this principle is particularly true in the classroom, as young children are easily distracted by their peers.<sup>116</sup> One child’s disruption destroys the ability of all students, including herself, to learn at that moment.<sup>117</sup>

The IDEA regulation explanatory note states: “Where a handicapped child is so disruptive in a regular classroom that the education of the other students is *significantly* impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her needs.”<sup>118</sup> The explanation (and the New York City interpretation) is concerned only with significant impairments to the education of general students.<sup>119</sup> Opponents argue that it shows a fundamental misunderstanding of how a classroom works.<sup>120</sup> A substantial amount of learning is lost by students before a disruption becomes so severe that learning is significantly impaired.<sup>121</sup>

Further, opponents point out that it does not take much for a child to lose focus on her studies.<sup>122</sup> Even a low or moderate distraction can harm the educational progress of a classroom community.<sup>123</sup> According to Professor Dupre, “children are easily diverted from their studies, and indeed often welcome the smallest distraction as an excuse to attend to something other than the task at hand.”<sup>124</sup> Furthermore, an interruption that does not distract one student may be more than enough to ruin another student’s concentration.<sup>125</sup> Thus, opponents argue that in following the IDEA’s mandate, too much learning must be lost before a distraction can qualify as a significant impairment.<sup>126</sup>

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115. Edward P. Lazear, *Educational Production*, Q. J. ECON., 777, 780 (2001).

116. See Dupre, *supra* note 6, at 847.

117. Lazear, *supra* note 115, at 780.

118. 34 C.F.R. § 300.552 (2003) (emphasis added).

119. 34 C.F.R. 300.552.

120. Dupre, *supra* note 6, at 846.

121. Significant impairment is impairment “having or likely to have a major effect” or impairment that is “fairly large in amount or quality.” American Heritage College Dictionary 1268 (3d ed. 1993). Under this standard then, disruption that has a moderate, but not substantial effect may warrant inclusion. Dupre, *supra* note 6, at 846.

122. Dupre, *supra* note 6, at 846.

123. *Id.* at 847.

124. *Id.*

125. *Id.* at 846.

126. *Id.*

#### D. The Frustrated General Teacher

The general education teacher plays a critical role in the inclusion process.<sup>127</sup> The teacher is the catalyst who ensures that learning takes place in the classroom community.<sup>128</sup> The teacher's attitude affects the teaching strategy and the students in her class.<sup>129</sup> Her attitude directly relates to her expectations of the students and affects how she treats them.<sup>130</sup> In turn, this influences a student's self-image and performance in class.<sup>131</sup> The opponents point to research showing that many general education teachers have negative views of inclusion.<sup>132</sup> Inadequate training and a lack of knowledge or experience with disabled students were cited as reasons for their negative attitudes.<sup>133</sup> Opponents argue that if a teacher does not feel comfortable and positive in the inclusive classroom, all her students will suffer.<sup>134</sup>

Moreover, the full inclusion advocates who criticize special education have historically maintained that teacher training in special education is inadequate and ineffective for handling disabled students.<sup>135</sup> Full inclusion opponents respond that if this is true, then it is difficult to understand how the general teacher could be more effective, having even less training in handling disabilities than special education teachers.<sup>136</sup> Opponents chastise the advocates' assumption that teachers, with no background or education in dealing with disabilities, can adequately adapt their general classroom to include any disabled student.<sup>137</sup> Inclusion, challengers say, urges teachers to dispense weak, spontaneous treatments in response to disabled students' learning problems that are often severe.<sup>138</sup> Advocates of full inclusion respond that training will promote positive attitudes and skill acquisition, while support services will provide assistance and information for the general teacher.<sup>139</sup>

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127. Wong, *supra* note 1, at 287.

128. Dupre, *supra* note 6, at 849.

129. Wong, *supra* note 1, at 287.

130. *Id.*

131. *Id.* at 287-88.

132. *Id.*

133. *See id.*

134. *See* Wong, *supra* note 1, at 287-88.

135. Kauffman & Mock, *supra* note 4, at 17.

136. *Id.*

137. *See* Wong, *supra* note 1, at 287-88.

138. Kauffman & Mock, *supra* note 4, at 12.

139. Wong, *supra* note 1, at 288.



Even if training is improved and teacher aides provide assistance, however, opponents maintain that inclusion still poses a tremendous burden on the general teacher.<sup>140</sup> They argue that increasing the demands on a general teacher's time can decrease the quality of education for all students.<sup>141</sup> They explain that teachers simply cannot teach a general education class effectively while simultaneously offering the "intensive, focused, relentless instruction" needed by many disabled students.<sup>142</sup> Furthermore, full inclusion opponents argue that distractions from the disabled student may cause the teacher to lose concentration.<sup>143</sup> Even if she is not a distraction, the disabled student may take up a disproportionate amount of the teacher's time, preventing other children from excelling academically.<sup>144</sup>

Opponents further argue that trying to satisfy both the general and disabled student will leave a teacher feeling torn and stressed.<sup>145</sup> According to researcher William C. Morse, "with the increased number of high-need . . . children in regular classes today, many teachers find themselves fatigued to the point of zombie-like responses."<sup>146</sup>

At what point does the amount of time a teacher spends attending to a disabled student become so disproportionate to the time spent on the other children that the education of that student in the regular classroom is no longer "appropriate?"<sup>147</sup> At one extreme, the Third Circuit asserted that only when a disabled student requires so much attention that the teacher effectively "ignores the other students," can the amount of time and attention spent on a disabled student be considered a factor in precluding inclusion of that child.<sup>148</sup>

### **E. A Crowded Classroom**

To assist the general teacher in handling the needs of the disabled student, teacher aides with special education training are

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140. Dupre, *supra* note 6, at 852.

141. *Id.* at 848-49.

142. Kauffman & Mock, *supra* note 4, at 6.

143. Dupre, *supra* note 6, at 847.

144. *Id.* at 821.

145. *Id.* at 852.

146. *Id.* (quoting William C. Morse, Note, *Comments From a Biased Viewpoint*, 27 J. SPECIAL EDUC. 531, 539 (1994)).

147. *Id.* at 849.

148. *Id.* at 850 (citing *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1217 (3rd Cir. 1993)).

often part of the general classroom.<sup>149</sup> Full inclusion advocates believe that the specialized help provided by these aides makes the inclusion of a student with any disability possible.<sup>150</sup> But opponents contend that not every aide is a willing participant.<sup>151</sup> Rather, special education teachers who are placed in the inclusion classroom worry about loss of work, relocation uncertainties, and resistance to collaboration from the general education teacher.<sup>152</sup>

Furthermore, the teacher aide and general teacher may have difficulties communicating with one another, or they may just find little room to breathe.<sup>153</sup> Opponents explain that historically, special education teachers have felt more qualified to handle disabled students.<sup>154</sup> As a result, communication between special and general educators may be difficult due to the perception that special educators were, or considered themselves, better trained and qualified than general teachers at handling disabled students' needs.<sup>155</sup>

Opponents also argue that an expansive use of supplemental teacher aides and materials for disabled students in the general classrooms will have a great financial impact on the school system.<sup>156</sup> Although courts take into account the financial burden of inclusion,<sup>157</sup> opponents maintain that often the balancing tests used by courts do not take into account the full impact on an entire school system; significant resources are necessary to provide aides and services to include disabled children throughout an entire district.<sup>158</sup> In the aggregate, financial expenditures on supplemental teacher aides and materials for disabled students can have a significant impact on the education of other students in the school district.<sup>159</sup>

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149. *Id.* at 854.

150. *See* Wong, *supra*, note 1, at 288.

151. JEAN B. CROCKETT & JAMES M. KAUFFMAN, *THE LEAST RESTRICTIVE ENVIRONMENT: ITS ORIGINS AND INTERPRETATIONS IN SPECIAL EDUCATION* 23 (1999).

152. *Id.*

153. *See* HALLAHAN & KAUFFMAN, *supra* note 28, at 79.

154. *Id.*

155. *Id.*

156. Dupre, *supra* note 6, at 856.

157. *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398, 1402 (9th Cir. 1994) (noting that the financial burden imposed on a school district by inclusion is one of the factors courts look to).

158. Dupre, *supra* note 6, at 856.

159. *Id.* at 856-57.

**PART III: A PROPOSAL TO BETTER THE SITUATION FOR ALL****A. The Consequences of Inappropriate Inclusion**

Inappropriate inclusion of a disabled student into a general classroom may perpetuate and even enlarge the stigma of disability.<sup>160</sup> If the disabled student receives special accommodations in the general classroom that the general student perceives as unfair, the general student will resent the disabled student.<sup>161</sup> The stigma of disability is thus not eradicated. Furthermore, if adjustments are made solely for the benefit of the disabled student, is inclusion actually providing equal educational opportunities for all students?

Full inclusion is likely inadequate and may actually harm the non-disabled student.<sup>162</sup> As disabled students enter the general classroom, lesson plans must be tailored to suit the diversified needs of a mixed student body.<sup>163</sup> Accordingly, the general student may be held back by her disabled classmate and prevented from learning at her optimal speed.<sup>164</sup> Furthermore, the teacher, laden with the task of meeting the diverse needs of all her students, may be unable to devote as much time to the education of the general student as she would have in the homogenous classroom.<sup>165</sup> Additionally, a lack of teamwork between the general teacher and the special education aides, who are in the classroom to assist the disabled students, may make for a hostile environment.<sup>166</sup> Finally, frequent disruptions by an inappropriately included disabled student (whether because she needs special assistance or because her disability, by its nature, is literally disruptive) will impede learning for the rest of the classroom.<sup>167</sup>

It flows from this that full inclusion is not wise. A disabled student who requires many accommodations,<sup>168</sup> disrupts classmates,<sup>169</sup> or conflicts with the class's learning curve,<sup>170</sup> should not be in the general classroom. If already in the general classroom, such a disabled student should be removed. Accordingly, schools must develop a specific system to remove from the general classroom, a

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160. *See supra* Part II.A.

161. *Id.*

162. *See supra* Part II.

163. *See supra* Part II.B.

164. *Id.*

165. *See supra* Part II.D.

166. *See supra* Part II.E.

167. *See supra* Part II.C.

168. *See supra* Part II.A.

169. *See supra* Part II.C.

170. *See supra* Part II.B.

disabled student who has been inappropriately included, to the detriment of her classmates.

### B. The Continuum in New York Public Schools

According to Mark Kelman and Gillian Lester, "formal federal law is quite open-ended in directing school districts whom to diagnose as having a learning disability, what diagnostic procedures to follow, how to educate those who have been diagnosed."<sup>171</sup> Consequently, school districts across the nation are left to interpret the IDEA's requirements on their own.<sup>172</sup>

New York does not advocate full inclusion. The Continuum makes it clear that IEP teams are to consider whether inclusion is appropriate for a disabled student, or whether she might be better served in a special education environment.<sup>173</sup> According to the IDEA, however, schools may use segregated, special education classrooms only when disabled students cannot achieve satisfactory progress in a general educational environment.<sup>174</sup> This federal pressure toward inclusion seems to make it difficult for any school district to know when inclusion is inappropriate.

Schools exist to educate.<sup>175</sup> Thus, the objective of a school district should always be to provide the best education to the greatest amount of students. Accordingly, inclusion should only occur when it is in line with the school's goal of providing superior education for all students. Inclusion is the logical choice when a child's disabilities are so minimal that inclusion would be beneficial to the child's social and educational growth, without adversely affecting her classmates.<sup>176</sup> Many disabled students excel in the general classroom and are a welcome addition to the class, by both teachers and general students alike. But not all disabled students flourish in the general classroom.<sup>177</sup>

New York's Continuum follows most courts' belief that a disabled student who significantly disrupts the teacher, students or curriculum is not suitable for the inclusive classroom.<sup>178</sup> Like the

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171. KELMAN & LESTER, *supra* note 85, at 67.

172. *See id.*

173. *See* SCHOOL PROGRAMS, *supra* note 63.

174. *See* 20 U.S.C. § 1412 (5)(b) (1998).

175. Crossley, *supra* note 4, at 255.

176. *See id.* at 253-54. Put in economic terms, inclusion is efficient when there are benefits to the disabled student at no cost to the general student. Lazear, *supra* note 115, at 791.

177. *See* Crossley, *supra* note 4, at 254.

178. SCHOOL PROGRAMS, *supra* note 63.

courts, however,<sup>179</sup> the Continuum fails to explain just how disruptive a disabled student must be before she is removed from the general classroom. The Continuum must establish a specific system to remove a disabled student who has been inappropriately included, to the detriment of the class.

### C. Three Strikes and You Are Out

A "Three Strikes" system is a solution.<sup>180</sup> Under the system, a complaining student, her parent, or even the general teacher, may petition the school to remove a disabled child from the general classroom for disruptive behavior if, on three occasions, the child's outbursts cause the teacher to discontinue teaching, create an environment in which concentration is impossible, or in some way harms the other students in the class.<sup>181</sup> Put simply, the Three Strikes system defines the threshold for when a disabled student becomes so disruptive that her inclusion in the general classroom is inappropriate.

Under the Three Strikes system, each distraction by a disabled student would be documented by the general teacher and reported to the student's IEP team. If the student accumulates three distractions, she may be removed from the general classroom by the IEP team, and placed in a more appropriate special education environment. A removal should not be considered permanent.<sup>182</sup> Rather, the disabled student may be given the opportunity to return to the general classroom if her special education teacher and IEP team believe the student is ready to try again.<sup>183</sup> Additionally, the disabled student's due process rights remain intact, as her parents may still contest her new IEP placement in accordance with the IDEA.<sup>184</sup>

Allowing a disabled student three attempts to integrate into the general classroom before she is subject to removal gives the student a chance to make some, but not too many, mistakes. Accordingly, the Three Strikes system sets a floor, to ensure that a general

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179. Crossley, *supra* note 3, at 257.

180. The Three Strikes system is the author's original proposal, based on the suggestions of Kathryn E. Crossley. *See id.* at 258-59. Ms. Crossley suggested a disabled student be removed from the general classroom if on at least one occasion she disrupts the classroom. The child would be given the opportunity to come back to the classroom in time if improvement was evident. *See supra* Part I.(B).

181. Crossley, *supra* note 3, at 258-59.

182. *Id.* at 259.

183. *Id.*

184. *Disciplining Children*, *supra* note 26, at 164.

student or the general teacher does not abuse the Continuum by unfairly petitioning to remove a disabled student from the general classroom. At the same time, the specificity of Three Strikes provides the general student with a precise way to assert her right to proper education. It is both fair and efficient for all those in the general classroom.

The Three Strikes system finally gives general students a voice in the inclusion debate. New York City's Continuum is a great start, but parents of non-disabled students must be assured that the school and the government are at least equally concerned about the education of their children as they are about the education of children with disabilities.<sup>185</sup> The Three Strikes system does just that.

#### **D. Eliminating the Stigma of Special Education**

When inclusion is inappropriate for a disabled student, the special education classroom provides the necessarily unique instruction she needs to grow to her full potential. But to make special education the attractive and effective solution, its stigma must first be eliminated.

Segregation based on academic ability stigmatizes only if one group is deemed inferior to the other. According to full inclusion opponent Professor Anne Proffitt Dupre, "[I]t is not necessarily the separation, but the meaning behind the separation that stigmatizes the separated students."<sup>186</sup> Segregation that places a disabled student in a setting where she can flourish, whether a wheelchair basketball court or a special education classroom, may simply be based on the child's unique needs.<sup>187</sup> The segregation of a disabled child in a special education classroom is motivated by "sound educational justification" and "legitimate school concerns."<sup>188</sup> This is quite different from the practice of racial segregation, which irrationally separated students based on the color of their skin. If a school district has a well-equipped special education department whose proper motive is to provide the best educational opportunities possible for its disabled students, then special education will not stigmatize. Rather, special education, like classrooms that seg-

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185. *Id.* at 181.

186. Dupre, *supra* note 6, at 819.

187. *Id.*

188. *Id.*

regate students who are gifted or who possess certain academic proficiencies, will be seen as something of educational value.<sup>189</sup>

If special education is promoted positively, it will become an essential resource for the disabled student who cannot appropriately be served in the general classroom, as well as the disabled student who needs an "extra push" before returning to the general classroom again someday. The school's resources will not have to change (special education teachers and accommodated lesson plans will be still be used). By creating a more positive special education environment, a disabled student might be more confident in learning, and a general student might accept the disabled student as different but equal. The focus will no longer be on where education takes place for the disabled student, but how to make it better, regardless of location.

### CONCLUSION

The debate over inclusion has neglected to truly evaluate how inclusion affects the general, non-disabled student. At its best, inclusion gives an opportunity for general students to learn firsthand about the differences and similarities of human beings.<sup>190</sup> But at its worst, inclusion can prevent the general student from learning to her fullest potential.<sup>191</sup> If a disabled student is inappropriately included in the general classroom, the general student could resent the disabled student for the special accommodations she receives or the burden she presents.<sup>192</sup> Worse yet, when inclusion is wrong, a general student's learning may suffer because of the disabled student's distractions or effects on the curriculum.<sup>193</sup>

The IDEA's requirement that disabled children be educated along with non-disabled children "to the maximum extent appropriate,"<sup>194</sup> shows that while the IDEA supports inclusion, it mandates it only when appropriate. The concept of full inclusion is both superfluous and unreasonable. Some disabled students will not flourish in the general classroom.<sup>195</sup> Additionally, some disabled students cannot be assimilated into the general classroom without detriment to the rest of the class.<sup>196</sup>

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189. *Id.* at 818.

190. Wong, *supra* note 1, at 288.

191. *See supra* Part II.

192. *See supra* Part II.A-B.

193. *See supra* Part II.B-C.

194. 20 U.S.C. §1412(5)(b) (2000).

195. Crossley, *supra* note 3, at 257.

196. *See supra* Part II.

The Continuum, established by New York City in 2000, has the potential of being an acceptable implementation of the IDEA's mandate regarding inclusion. It reasonably requires inclusion when appropriate, yet allows for a disabled student's enrollment in special education when necessary to protect the interests of all students.<sup>197</sup> But to be truly fair, general students need a means to take back their education when it is challenged by inappropriate inclusion of a disabled student.<sup>198</sup>

Under the Three Strikes system, a disabled student gets three chances before her inability to assimilate into the general classroom is grounds for removal.<sup>199</sup> A disabled student who is removed may strive to return to the general classroom in time, but for now she would best excel in a special education classroom with lessons tailored to her needs.<sup>200</sup> Accordingly, to be an effective alternative, special education must be promoted as a positive and necessary arena for learning.<sup>201</sup>

While protecting the disabled student, the Three Strikes system finally lets the general student rest easy, knowing that there is a specific way to remove a disabled student who prevents the class from reaching its full academic potential.<sup>202</sup> The system protects the interests of all students, while restoring public schools' quintessential academic goal of providing the best education for the most number of students.

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197. SCHOOL PROGRAMS, *supra* note 63.

198. *See supra* Part III.B-C.

199. *See supra* Part III.C.

200. *Id.*

201. *See supra* Part III.D.

202. *See supra* Part III.C.